

FEB 14 2001

This responds to your letter requesting an opinion as to whether money that your client pays to its employees for discovering and confiscating unauthorized credit cards should be included in their regular rate of pay for purposes of overtime pay calculations. We apologize for the delay in responding to your inquiry. As discussed below, we conclude that the money should be considered part of the employee's regular compensation.

We understand from your letter that your client employs cashiers, whom it provides to retail and service establishments. In the normal course and scope of their cashier duties, these employees determine whether credit cards issued by banks and credit card companies are authorized. The employees retain those cards that they find have been used without authorization. Pursuant to the employer's written policy, it pays a \$50.00 "finder's fee" to a cashier for each card (s)he recovers after a confirmation that the card is unauthorized. Several weeks or months later, the bank or credit card company that issued the card pays the employer for the recovery of the card. According to your letter, the employer takes the position that its payment to the employee should not be considered part of the employee's regular pay, because the employer is merely advancing the money to the employees for their convenience, and the employees do not have to perform any extra duties in order to receive the money.

With limited exceptions, the FLSA provides that "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. 207(e). A review of the provision reveals that the "finder's fee" meets none of the exceptions for being excluded from an employee's regular rate of pay. 29 U.S.C. 207(e)(1) - 29 U.S.C. 207(e)(7).

Contrary to the employer's position, the fact that the employees are paid the money for discovering and confiscating the credit cards during the normal course of their work duties indicates

that the money should be included as part of their regular pay. Specifically, we would like to direct your attention to 29 U.S.C. 207(e)(1), which excludes from the "regular rate" only those payments, "the amounts of which are not measured by or dependent on hours worked, production, or efficiency." Consistent with that statutory provision, 29 C.F.R. 778.331 of the regulations implementing the FLSA provides that:

Where a prize is awarded for the quality, quantity or efficiency of work done by the employee during his customary working hours at his normal assigned tasks (whether on the employer's premises or elsewhere) it is obviously paid as additional remuneration for employment.

Inasmuch as your letter reflects that the employees receive the "finder's fee" for their accomplishments during the regular course of employment and the fee is, in essence, a reward for their efficiency in discovering and retaining unauthorized credit cards, the payment should be considered remuneration that is included in the regular rate of pay.

We would also direct your attention to Section 7(e)(3) of the FLSA, which indicates that the payments in question should be considered regular pay. 29 U.S.C. 207(e)(3). According to that section, payments made to reward services during a given period should be excluded from the regular rate only if they are not made pursuant to a "prior contract, agreement, or promise causing the employee to expect such payments . . .," and the issues related to the payment, including whether to make and the amount of the payment, are within the sole discretion of the employer. Inasmuch as the payments for recovering the unauthorized credit cards are made pursuant to a written policy, causing the employees to expect such payments in a preestablished amount, it again appears that the payments should be considered part of the regular rate of pay under the FLSA.

Characterizing the payment as an advance does not change our opinion. The fact remains that the employer pays the additional money to the employees for their detection and retention of unauthorized credit cards. Therefore, the nature of the payment to the employees would not change simply because the employer waited until it received its payment from the credit card issuer to pay the employees.

As for your question related to whether our opinion would change if the credit card issuer paid the employees directly, all the payments to the employees from either source are "wages" and must be included in the regular rate of pay of the employees.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.

I trust that the above is responsive to your inquiry.

Sincerely,

Thomas M. Markey  
Acting Administrator